In the Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 496

THE TERMINAL AND SHAKER HEIGHTS REALTY CO.,
Petitioner,

vs.

CHARLES L. BRADLEY and
JOHN P. MURPHY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT OF PETITION.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

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AUTHORITIES CITED.

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To the Honorable, The Chief Justice and the Associate Justices of the United States:

Petitioner, The Terminal and Shaker Heights Realty Company, hereby petitions for the issuance of a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, whose judgment was made final on June 26, 1944, when it denied a rehearing of its decision of April 21, 1944, affirming the judgment below.

STATEMENT OF THE MATTER INVOLVED.

This is a controversy arising out of the corporate reorganization proceedings of The Higbee Company pursuant to Chapter X of the Bankruptcy Act which has been pending in the United States District Court for the Northern District of Ohio, Eastern Division.

Respondents Bradley and Murphy filed their proofs of claim, each claiming to be the owner of a one-half undivided interest in certain Higbee securities, having acquired such interests from George and Frances Ball

Foundation by bill of sale dated June 4, 1937. It is not disputed that Bradley and Murphy have the naked legal title to the securities (R. 2). The securities represent control of the Higbee Company and have a current market value of around $1,500,000.

Petitioner The Terminal and Shaker Heights Realty Company (formerly known as Midamerica Corporation and hereinafter referred to as "Midamerica") filed its proof of claim (R. 51) asserting that Higbee was indebted to Midamerica as the equitable owner of the same Higbee securities. Such equitable ownership springs from the fiduciary relationship to petitioner occupied by respondents C. L. Bradley and J. P. Murphy, and the breach of the fiduciary obligations incident to such relationship at the time of and subsequent to their purchase of the securities from the George and Frances Ball Foundation.

The conflicting proofs of claim in the reorganization proceedings and the answers thereto created the issues upon which this case was tried.

The Higbee securities, the equitable ownership of which is the subject of this litigation, are the following:

$69,673.71	participation in $523,043.51 Higbee Company note due March 1, 1934
$1,292,534.74	Higbee Company subordinated note due March 1, 1934
$258,506.94	Higbee Company subordinated note due March 1, 1934
100,000	shares Higbee Company common stock.

Despite the change in the form of the securities, which has been provided by a plan of reorganization, they will be referred to herein merely as the "Higbee securities."

In the courts below Robert R. Young, Allan P. Kirby and Frank F. Kolbe also filed proofs of claim charging that Bradley and Murphy had violated fiduciary duties to them individually when they purchased the Higbee securities from Ball Foundation. The conflicting claims were tried

simultaneously and the hearing on all claims was reported in a single record. The Circuit Court of Appeals held in favor of Bradley and Murphy. Young, Kirby and Kolbe have not filed petitions for writs of certiorari. Young and Kirby, however, are the controlling stockholders of Midamerica and as such they will be frequently referred to in the brief in support of this petition.

JURISDICTION INVOKED.

The jurisdiction of this Court to grant the Writ is invoked under 240 (a) of the Judicial Code, 28 U. S. C. A., Sec. 347(a). The judgment of the U. S. Circuit Court of Appeals for the Sixth Circuit affirming the decision below was rendered April 21, 1944 (R. p. 560) and was made final by the denial of the Petition for Rehearing on June 26, 1944 (R. p. 581). This petition is filed within the statutory period.

OPINIONS BELOW.

The opinion below of the District Court was published. It appears in 50 Fed. Supp. 114 and in the Record at page 518. The opinion of the Circuit Court of Appeals is published in the Advance Sheets of the Federal Reporter 142 F. (2d) 658, and appears in the Record at page 560.

THE QUESTIONS PRESENTED.

1. Can an executive officer and director defend his acquisition of securities representing a conflicting interest against the employer corporation's claim of constructive trust on the ground that a court found, two years after he acquired the conflicting interest, that the corporation's interest in the subject of the asserted trust was not substantial?

2. Does estoppel bar the claim of a corporation to impress a constructive trust upon securities acquired by an executive officer and director because he changed his posi-

tion to his detriment by paying a large sum to certain preferred stockholders to buy their pending appeal in a bankruptcy reorganization proceeding so that he might dismiss it, and thereafter borrowed money to pay, in accordance with its terms, a note which he had given as part of the purchase price of the securities, the note having been acquired by the corporation in the meantime?

3. Does federal procedure permit a Circuit Court to bar an appellant's claim on the ground of laches when the appellant in filing its claim, relied upon and followed the orders of the District Court in a bankruptcy reorganization, and when the Master's finding against the defense of laches was confirmed by the District Judge, and appellees took no exception to such finding nor to the order confirming it?

REASONS FOR ALLOWANCE OF THE WRIT.

Important and interesting questions arising out of a major bankruptcy proceeding are here presented. These questions are based upon conceded facts. They involve broad principles governing the fiduciary responsibility of officers and directors to their corporations, with particular reference to conflicts of interest growing out of changes in corporate relations brought about in bankruptcy reorganization. They also involve an important matter of federal procedure.

In this case the Sixth Circuit Court of Appeals has found that corporate officers had put themselves in a position of conflict adverse to the interests of their corporation, but relieved the officers from accounting for the profits thus acquired largely on the ground that the corporation's interest in the matter had, two years after the conflict arose, been adjudicated to be nominal. This decision is in conflict with the ruling of the Second Circuit U. S. Court of Appeals in the case of *Irving Trust Co. vs. Deutsch*, 73 F. (2d) 121, decided in 1934. In that case officers and directors of a corporation which went into bankruptcy were held accountable by constructive trust in favor of their corporation by

reason of putting themselves in a position of conflict adverse to the interests of their corporation. The court there held that no circumstances should relieve such officers from accounting for the profits thus acquired. In so holding the court quoted the classic sentence from Judge Cardozo's opinion in *Meinhard vs. Salmon,* 249 N. Y. 258, as follows:

> "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions."

The rule of the Second Circuit Court was followed without limitation in *In re Commercial Tobacco Co.,* 34 Fed. Supp. 304 (D. C. S. D. N. Y. 1940). Whether litigants are to be governed by the rule of "uncompromising rigidity" of the Second Circuit Court of Appeals or that of "disintegrating erosion of particular exceptions" here adopted by the Sixth Circuit should be settled by the Supreme Court.

The conduct of common officers of two corporations in bankruptcy reorganization and their right to influence the outcome of the proceedings after acquiring a conflicting interest in one of the corporations during the course of the reorganization, is a matter of great general interest. So far as we can find, the Supreme Court has not passed upon these questions.

PRAYER FOR RELIEF.

Wherefore, the petitioner, by its counsel, prays the issuance of a Writ of Certiorari to the U. S. Circuit Court of Appeals for the Sixth Circuit to the end that the judgment may be reversed and for such other relief as to the court may seem fit.

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